

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

NONRULE POLICY DOCUMENT

DRAFT

Title: Reasons for Denial

Identification Number: Water-011-NPD

Date Originally Effective:

Dates Revised: None

Other Policies Repealed or Amended: None

Brief Description of Subject Matter: **Conditions under which the Indiana Department of Environmental Management will deny issuance of State Regulated Wetland permits or §401 water quality certifications.**

Citations Affected: 327 IAC 17-1-8

Disclaimer

This nonrule policy document is intended solely as guidance and does not have the effect of law or represent formal Indiana Department of Environmental Management (IDEM) decisions or final actions. This nonrule policy document shall be used in conjunction with applicable laws. It does not replace applicable laws, and, if it conflicts with these laws, the laws will control. This nonrule policy document may be put into effect by IDEM thirty (30) days after presentation to the appropriate board. Pursuant to IC 13-14-1-11.5, this policy will be available for public inspection for at least forty-five (45) days prior to presentation to the appropriate board. If the nonrule policy is presented to more than one (1) board, it will be effective thirty (30) days after presentation to the last. IDEM will submit the policy to the Indiana Register for publication. Revisions to the policy will follow the same procedure of presentation to the board and publication.

Statement of Purpose

The purpose of this non-rule policy document is to identify the reasons for which IDEM denies authorizations under both the State Regulated Wetland Permit program and the §401 water quality certification program. Reasons for denial fall within three main categories: deficient applications, unnecessary activities and proposed compensatory mitigation that will not offset the effect of the activity.

Background

IDEM has the authority to deny a permit for cause under 327 IAC 17-1-8 provided that IDEM supports this denial with a written statement of reasons. Similarly, IDEM may deny a §401 water quality certification under 33 U.S.C 1341(a)(1). Activities regulated under the State Regulated Wetlands program or the §401 water quality certification program may constitute, cause or contribute to effects such as, flooding, erosion, stream destabilization, degradation of water quality (including the chemical, physical and biological integrity of Indiana's waters), habitat degradation, or reduction in groundwater recharge.

IDEM may authorize activities that are likely to constitute, cause or contribute to the above listed effects through individual authorizations in both programs if the activity is necessary and if the effect is temporary because the area in which the activity occurs is restored to its original condition or because the effect of the activity is offset through compensatory mitigation.

Activities in Class II or Class III wetlands that fail the reasonable alternative demonstration required under 327 IAC 17-4-8, or the reasonably necessary or appropriate

demonstration required under 327 IAC 17-4-9 are unnecessary. Due to the similarity in wording, and in goals and the desire to maintain consistency between the two programs, IDEM interprets the avoidance and minimization requirements under IC 13-18-22-5(a)(1)(B) to be equivalent to that required under 40 CFR 230 for Waters of the United States thus requiring comparable demonstrations for both Class III wetlands regulated under the State Regulated Wetlands Permitting program and Waters of the United States regulated under the §401 water quality certification program. USEPA has requested the states tie their §401 water quality certification review to the avoidance and minimization language in 40 CFR 230.10¹.

This non-rule policy document does not cover the end use of the Regional General Permit, or general permits under 327 IAC 17-2 or 17-3. Since IDEM authorizes these in advance, they are not approved or denied *per se* on an individual project basis.

Policy Resolution

The Indiana Department of Environmental Management shall deny a permit or certification if the application is deficient, if the activities are unnecessary, or if the proposed compensatory mitigation is determined to be insufficient to offset the effects of the activity.

¹ USEPA. 1990. Water Quality Standards for Wetlands. National Guidance. EPA 440/S-90-011.

Deficient Applications

Applications are deficient if IDEM determines that incomplete or inaccurate information has been provided. IDEM makes every effort to notify applicants of a deficient application, when appropriate and when statutory deadlines allow. IDEM, if statutory review periods allow, may send the applicant email or other correspondence noting the deficiency(s) rather than a denial letter. Should the applicant fail to respond to this correspondence within the time period provided by IDEM, then IDEM may deny the permit or certification. In cases where the applicant has responded inadequately, IDEM, if statutory review periods allow, may send a second correspondence noting the deficiency(s) rather than a denial letter.

Unnecessary Activities

An activity is unnecessary if any of the following apply.

1. For activities in Class II and Class III State Regulated Wetlands, the applicant has failed to demonstrate that the activity has no reasonable alternative:

“A wetland activity is considered to be without reasonable alternative if: (1) an executive of the county or municipality in which the wetland is located issues a resolution stating that the wetland activity is without reasonable alternative to achieve a legitimate use proposed by the applicant on the property on which the wetland is located; (2) a local government entity that has authority over the proposed use of the property on which the wetland is located issues a permit or other approval stating that the wetland activity is without reasonable alternative to achieve a legitimate use proposed by the

applicant on the property on which the wetland is located; or (3) the department, in the absence of a local determination under this section, determines the wetland activity is without reasonable alternative to achieve a legitimate use proposed by the applicant on the property on which the wetland is located.” [327 IAC 17-4-8]

2. For activities in Class II and Class III State Regulated Wetlands, the applicant has failed to demonstrate that the activity is reasonably necessary or appropriate:

“A wetland activity is considered to be reasonably necessary or appropriate if: (1) an executive of the county or municipality in which the wetland is located issues a resolution stating that the wetland activity is reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located; (2) a local government entity, having authority over the proposed use of the property on which the wetland is located, issues a permit or other approval stating that the wetland activity is reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located; or (3) the department, in the absence of a local determination under this section, makes a determination that the wetland activity is reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located.” [327 IAC 17-4-9]

3. In Class III State Regulated Wetlands and Waters of the United States, the applicant has failed to demonstrate that the activity has no practical alternative:

- a. *“The applicant shall demonstrate, as a prerequisite to the issuance of the permit, that the wetland activity is as follows: (A) Without a reasonable alternative under section 8 of this rule. (B) Reasonably necessary or appropriate to achieve a legitimate use proposed by the applicant on the property on which the wetland is located under section 9 of this rule. (C) For a Class III wetland, as follows: (i) Without a practical alternative. (ii) Will be accompanied by taking steps that are practicable and appropriate to minimize potential adverse impacts of the discharge on the aquatic ecosystem of the wetland. (D) For a Class III wetland, an applicant’s demonstration in clause C(i) and C(ii) is not satisfied by the demonstrations in section 8 or 9 of this rule.” [327 IAC 17-4-3(8)(C)]*
- b. *“... no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences...” [40 CFR 230.10]*

4. In Class III isolated wetlands and Waters of the United States, the applicant has failed to demonstrate that he or she has taken steps that are practicable and appropriate to minimize potential adverse impacts:

- a. *“...by taking steps that are practicable and appropriate to minimize potential adverse impacts of the discharge on the aquatic ecosystem of the wetland.” [327 IAC 17-4-3(8)(C)(ii)]*

- b. *“... no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem...”*

[40 CFR 230.10]

Compensatory Mitigation Will Not Offset the Effect of the Activity

Compensatory mitigation will be determined to be insufficient in the following cases.

1. Under both the State Regulated Wetlands program and the §401 water quality certification program, the mitigation plan is insufficient because:
 - a. It is determined to be inaccurate or incomplete;
 - b. Based on technical review by IDEM, implementation of the proposed mitigation plan will not meet the required success criteria²;
 - c. The applicant has failed to demonstrate that the proposed mitigation will successfully offset the effects (i.e., impacts) caused by the activity; or
 - d. The mitigation plan does not include a monitoring plan sufficient to measure the mitigation site's performance in relation to the success criteria.
2. Under the §401 water quality certification program, the applicant has failed to demonstrate that the proposed amount of compensatory mitigation for Waters of the United States is sufficient to overcome the risk of failure and the temporal loss

² See non-rule policy document -- Water-010-NPD (effective 9/8/06)

of function. Determination of sufficient mitigation is based on mitigation ratios derived from mitigation performance information collected and analyzed by IDEM or other published sources acceptable to IDEM;

3. Under the State Regulated Wetlands program;
 - a. The applicant has proposed an amount of compensatory mitigation for isolated wetlands inconsistent with 327 IAC 17-1-5(a); or
 - b. The applicant has proposed a compensatory mitigation location for isolated wetlands that is inconsistent with 327 IAC 17-1-5(c).,